SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 896

ANDREW J. KALERAK, JR., ET AL., *Petitioners,*

v.

WALTER J. HICKEL, Secretary of the Interior, AND STATE OF ALASKA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

MURPHY L. CLARK
807 G Street
Anchorage, Alaska 99501

GEORGE KAUFMANN
1815 H Street, N. W.
Washington, D. C. 20006

Attorneys for Petitioners

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The Secretary does not deny, and Alaska admits (Alaska Opp. p. 7), that the State's original application for the lands in question was "premature." And the State's claim cannot be supported by its subsequent amendments, for the Secretary of Interior's regulations unqualifiedly declared that amendments to

invalid selections "will not be allowed" (Pet. pp. 15, 45a). Indeed, the Secretary does not deny that the decision below is inconsistent with his regulations. Accordingly, it is clear that the Secretary's award of the land to Alaska is illegal, for as this Court's *Accardi* and *Service* decisions hold, those regulations *do* bind the Secretary of Interior, as well as the parties who appear before him.[1] The *Accardi-Service* principle will fail of its beneficent purpose to subject public officers to the rule of law if they come to believe that this Court will tolerate such manifest error. In short, if this case were factually unique, as respondents assert, the appropriate disposition in light of their silences and admissions on the merits would not be denial of certiorari; it would be summary reversal.

Respondents, recognizing the absence of legal justification, seek to sustain the Secretary's decision on grounds of equity (Hickel Opp. p. 6; Alaska Opp. p. 7). But this approach itself raises a question of profound public importance warranting the grant of certiorari. For we submit that the Secretary is not free to dispose of public lands according to his own notions of equity, and should be promptly disabused of such pretentions. Where, as here, Congress has already weighed the interests and established the policies according to which rights in public lands may be

[1] The State argues that the *Accardi-Service* principle is limited to regulations which afford due process of law. But the *Sheridan-Wyoming Coal* case, which Alaska itself cites (p. 8), recognized that the Secretary of Interior is bound by regulations indistinguishable from those involved in this case. See p. 16 of the Petition for Certiorari. We note also that in both *Service and Vitarelli* v. *Seaton,* petitioners alternatively tendered due process questions, on which this Court expressly declined to pass. See, 354 U.S. 363 at 372; 359 U.S. 535 at 539-540.

acquired, it is the duty of the Secretary and the courts to implement Congress' design rather than to substitute their own views of the equities. It must therefore be emphasized that the Secretary's decision herein did not implement the "preference given to Alaska by Congress" as he claims (Hickel Opp. p. 6), but instead nullified the conditions on that preference which Congress deliberately adopted. See Pet. pp. 11-14.

While we insist that "equitable" concepts cannot justify the result reached below, we by no means concede that the equities favor the State. At the heart of the matter is the State's assertion that the filing of an amendment to the original application was a mere "technical defect" (Alaska Opp. p. 5, n. 4), which could have been avoided simply by filing a new application in the same terms. But if the State had filed a new application, which would have complied with the statute and the regulations, the notice posted by the State would have made reference thereto, and petitioners and others in a similar position would have been apprised that a valid application had been made and that the lands were thereby closed to entry. Instead, petitioners were informed of an application which had been prematurely filed and of amendments which, as Alaska says, "expressly referred on their face to the original application" and "thereby incorporated [it] by express reference" (Alaska Opp. p. 5); although petitioners were on notice that "Alaska had unambiguously asserted its claim to these lands" (Hickel Opp. p. 6), the same notice advised them that *no valid claim* had been made and that the lands remained open to settlement. Thus, whereas both respondents, like the Court of Appeals, rely upon the notice to negate any prejudice to petitioners, that notice actually con-

stituted an open invitation to enter those lands because it instructed that they were not the subject of any prior *lawful* claims. If "equitable circumstances" (Hickel Opp. p. 6) are to be considered, they surely do not favor Alaska, whose errors induced petitioners' change of position.[2]

The Public Land Order withdrawing all public lands in Alaska from appropriation for two years, which had been anticipated in the Petition (p. 18), has now been promulgated.[3] The State is pleased to characterize our assessment of the consequences of the decision below in light of that order as "pure fantasy" and "only a little puffing" (Alaska Opp. pp. 7 and 9). But we anticipate that the Court will be more impressed by the Secretary's refusal to address himself to our analysis than by the State's colorful characterizations. For if the Secretary believed that we had exaggerated the potential impact of the decision below on the administration of the public land laws (Pet. pp. 18-22), he would have been quick to say so, since he

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[2] Since the equities have never been regarded to be pertinent to proceedings such as the present, petitioners did not adduce proof of the cost to them resulting from their justified reliance. But the Department's file, which is part of the record in this Court, contains letters by petitioners Kalerak and Trombley to the Department which describe their efforts to perfect their homestead rights. Kalerak recites that he had resided on the homestead site in a trailer for several weeks until he was driven off by the cold because no electricity and heating were available. Trombley wrote that he and petitioner Sipielman had built approximately one-half mile of access road across and into their respective claims. While we do not ask the Court to accept these letters for the truth of the statements therein, we submit that they are sufficient to require rejection of respondents' bald assertion, untested at a hearing, that the equities favor the State.

[3] P.L.O. 4582, 34 F.R. 1025.

is fully cognizant of this Court's interest in his views on this subject.

Moreover, the importance of this case cannot be measured simply by its immediate context, for it is characteristic of a recurring problem. Regulations such as those involved herein impose formal prerequisites for the assertion of private interests in the public domain under numerous statutes. If noncompliance with such regulations is to be excused on grounds of "intent," as the Court of Appeals decided, or equity, as respondents urge, these regulations will inevitably fail of their purpose. In our Petition (p. 17, n. 14), we noted a case in which the Secretary had awarded a lease to a party (Union) which had submitted the highest bid but had failed to sign that bid, notwithstanding the requirement of the Secretary's regulation that bids be signed. The next highest bidder (Superior), who had complied with the formal requirements, brought an action against the Secretary to enjoin him from issuing the lease to Union and to direct him to issue the lease to Superior. Shortly after our Petition was filed, the United States Court of Appeals for the District of Columbia Circuit issued its decision in this litigation.[4] The Court of Appeals, affirming the District Court, held against the Secretary. The dominant theme of Judge Burger's opinion for a unanimous Court is that adherence to the Secretary's regulations is essential if the integrity of the bidding system is to be maintained. That decision, while in accord with the principles established by this Court, is in irreconcilable conflict with the instant decision of the court below, which was prepared to waive ad-

[4] *Superior Oil Co.* v. *Udall* (C.A.D.C. Nos. 22,192 and 22,194, decided Jan. 6, 1969).

herence to such regulations. We respectfully invite the Court's attention to the opinion as a whole, but we here quote two passages which are particularly pertinent:

> "The Secretary's concern over the differential [of two million dollars] between Union and Superior is understandable but we think it misses the central legal issues and the important public policy underlying strict rules in bidding. It is also very important that bidders who comply faithfully and scrupulously with bidding regulations should not in effect be penalized by the errors of less careful bidders who fail to follow correct procedures." (Slip Op., p. 9)
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> "It would be plainly inequitable to Superior and damaging to the long range public interest in the integrity of the bidding process to allow Union, whose error has created this problem, to have a second opportunity to bid against Superior and all other bidders." (Slip Op., p. 12)

The District of Columbia Circuit's evaluation of the equities and the public interest is far sounder than that of respondents herein. To paraphrase Judge Burger's language, we submit that "it would be plainly inequitable to [petitioners] and damaging to the long-range public interest in the integrity of the [administration of the public land laws] to allow [Alaska] whose error has created this problem" to retain these lands at the expense of Petitioners, whose entry, unlike Alaska's, was in full compliance with the law.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the Petition for Certiorari should be granted.

Respectfully submitted,

MURPHY L. CLARK
807 G Street
Anchorage, Alaska 99501

GEORGE KAUFMANN
1815 H Street, N. W.
Washington, D. C. 20006

Attorneys for Petitioners